(1) No. _____

Supreme Court, U.S.
FILED

03 617 OCT 16 2003

OFFICE OF THE CLERK

In The

Supreme Court of the United States

SCOLLON PRODUCTIONS, INC.,
Petitioner,

v.

LISA OCHELTREE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Charles F. Thompson, Jr.
Counsel of Record
Michael D. Malone
MALONE & THOMPSON
1527 Blanding Street
Columbia, South Carolina 29201
(803) 254-3300

Counsel for Petitioner

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, Virginia 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

21 pp

QUESTIONS PRESENTED

1. Whether the Fourth Circuit Court of Appeals was correct in ruling that crude and offensive behavior that has sexual content can have a disproportionate impact on women and, therefore, constitute sexual harassment.

2. Whether the Fourth Circuit Court of Appeals was correct in considering conduct that was admittedly not directed at women or Ocheltree in determining that the harassment was severe and pervasive in violation of 42 U.S.C § 2000e-2(a) (1994).

LIST OF PARTIES TO PROCEEDING

The caption of the case includes all parties to the proceeding in the district court and court of appeals.

CORPORATE DISCLOSURE STATEMENT

The Petitioner, Scollon Productions, Inc. has no parent corporation and is not owned, wholly or in part, by any publicly-traded corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINION BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE PETITION 7

I. THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS -- THAT SEXUAL CONDUCT IN THE WORKPLACE, IF SUFFICIENTLY SEXUAL IN NATURE AND IF PERVASIVE ENOUGH IS "BECAUSE OF SEX," I.E., THAT SUCH CONDUCT HAS A DISPARATE IMPACT ON WOMEN 7

II. THIS COURT SHOULD ADDRESS THE IMPORTANT QUESTION (FORESHADOWED IN THIS COURT'S DECISION IN *ONCALE V. SUNDOWNER OFFSHORE SERVICES*) OF WHEN CONDUCT WITH SEXUAL CONTENT IS "BECAUSE OF SEX" AND WHEN IT IS NOT 7

III. THIS COURT SHOULD ADDRESS THE IMPORTANT QUESTION OF WHETHER A COURT MAY COMBINE CONDUCT THAT CANNOT BE HARASSMENT WITH CONDUCT THAT MAY BE HARASSMENT TO DETERMINE IF THE STANDARD OF "SEVERE AND PERVASIVE" IS SATISFIED. 11

CONCLUSION 13

APPENDIX ..... App. i

TABLE OF AUTHORITIES

Page(s)

CASES

Andrews v. City of Philadelphia,
895 F.2d 1469 (3d Cir. 1990) 9

Baskerville v. Culligan Int'l Co.,
50 F.3d 428 (7th Cir. 1995) 8, 12

Crist v. Focus Homes, Inc.,
122 F.3d 1107 (8th Cir. 1997) 9

DeAngelis v. El Paso Mun. Police Officers Ass'n,
51 F.3d 591 (5th Cir. 1995) 10

Fox v. Sierra Dev. Co.,
876 F. Supp 1169 (D. Nev. 1995) 10

Galloway v. Gen. Motors Serv. Parts Operations,
78 F.3d 1164 (7th Cir. 1996), *overruled in part on other grounds by Nat'l R.R. Passenger Corp v. Morgan*,
122 S. Ct. 2061 (2002) 10

Harris v. Forklift Systems, Inc.,
510 U.S. 17 (1993) 8, 9

Henry v. Fed. Home Loan Bank of Topeka,
155 F.3d 1257 (10th Cir. 1998) 9

Jensen v. Eveleth Taconite Co.,
824 F. Supp 847 (D. Minn 1993) 9

Meritor Sav. Bank,
477 U.S. 57 (1986) 11

Ocheltree v. Scollon Productions,
308 F.3d 321 (4th Cir. 2003) 1

Ocheltree v. Scollon Productions, Inc.,
335 F.3d 325 (4th Cir. 2003) 1, 8

Oncale v. Sundowner Offshore Servs., Inc.,
523 U.S. 75 (1998) 7, 8, 10, 12

Perry v. Harris Chernin, Inc.,
126 F.3d 1010 (7th Cir. 1997) 12

Radtke v. Everett,
442 Mich. 368, 501 N.W.2d 155 (1993) 10

Robinson v. Jacksonville Shipyards, Inc.,
760 F. Supp 1486 (M.D. Fla. 1991) 9-10

Spicer v. Com. of Va. Dept. of Corrections,
66 F.3d 705 (4th Cir. 1995) (*en banc*) 8

Stahl v. Sun Microsystems, Inc.,
19 F.3d 533 (10th Cir. 1994) 9

Turnbull v. Topeka State Hosp.,
255 F.3d 1238 (10th Cir. 2001) 9

Vandeventer v. Wabash National Corp.,
887 F. Supp. 1178 (N.D. Ind. 1995) 10

STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 2000e-2(a) 1

OTHER AUTHORITIES

Kathryn Abrams,
The New Jurisprudence of Sexual Harassment,
83 Cornell L. Rev. 1169 (1998) 10

Cheryl L. Anderson,
Thinking Within the Box: How Proof Models Are Used to Limit the Scope of Sexual Harassment Law,
19 Hofstra Lab. & Emp. L.J. 125 (2001).....10

Robert Kearney,
The Disparate Impact Hostile Environment Claim: Sexual Harassment Scholarship at a Crossroads,
20 Hofstra Lab. L.J. 185 (Spring 2003) 2, 10

Vicki Schultz,
Reconceptualizing Sexual Harassment,
107 Yale L.J. 1683 (1998) 10

David S. Schwartz,
When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law,
150 U. Pa. L. Rev. 1697 (2002).....10

OPINION BELOW

The Fourth Circuit Court of Appeals issued two decisions in this case. The first decision by a three-judge panel was voided by the subsequent opinion of the Fourth Circuit Court of Appeals sitting en banc. The initial decision is reported as *Ocheltree v. Scollon Productions*, 308 F.3d 321 (4th Cir. 2003). The en banc decision is reported as *Ocheltree v. Scollon Productions*, 335 F.3d 325 (4th Cir. 2003). The district court did not publish an opinion in this case. Its initial written order (judgment) and amended judgment are reprinted in the Appendix at App. C and App. D

JURISDICTION

The Fourth Circuit filed its decision on July 18, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

42 U.S.C § 2000e-2(a) (1994)

"It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . .."

STATEMENT OF THE CASE

Scollon Productions is a character costume company. They make character costumes such as the Flintstones, Spongebob Squarepants, "Barney,"and "Tweety Bird." They also make character costumes for college and professional sports teams. The company employs about fifty employees in White Rock, South Carolina including sculptors, sewers, and design artists. Lisa Ocheltree worked for Scollon for only eighteen months. After being terminated for unrelated

reasons, Ocheltree accused her co-workers of sexually harassing her. Although Scollon disputes her accounts, Ocheltree's story evolved to include tales of shockingly crude and inappropriate conduct. Sitting *en banc*, the Fourth Circuit Court of Appeals ruled that such conduct was sexual harassment because it had a disproportionate impact on women. This case therefore presents what commentators have described as one of the last "few great issues left to decide" of harassment jurisprudence. Robert Kearney, *The Disparate Impact Hostile Environment Claim: Sexual Harassment Scholarship at a Crossroads*, 20 Hofstra Lab. L.J. 185, 186 (Spring 2003)

Bill Scollon and his wife own Scollon Productions and have run it for thirty-one years. Ellery Locklear is the President of the company and has been with Bill and his family twenty-seven years. It is uncontested that Bill Scollon and Ellery Locklear are the only management or supervisory officials within the company.[1]

During the year and a half she was employed, Ocheltree received at least five written warnings and was counseled numerous times about excessive absenteeism and telephone usage in violation of company policy. After one of these warnings, Ocheltree's husband came to the plant, walked into the office of Ellery Locklear (who had just warned Ocheltree that she would be terminated if her conduct did not improve), and told him that he was going to "kick his ass" if he upset his wife one more time. Ocheltree was discharged shortly thereafter. The parties agreed the reasons for the discharge were not relevant to the harassment case and, therefore, no evidence of the discharge was used at

---

1 The Fourth Circuit opinion describes Harold Hirsch as a supervisor. However he was clearly not a supervisor under Title VII. It is uncontested he had no authority to hire fire or discipline. He was, however, a lead person in the production area and was sometimes referred to as a "shop supervisor."

trial by either party. Following her termination, Ocheltree claimed that she was subjected to a hostile environment because co-workers made inappropriate sexual remarks that she overheard and she witnessed incidents she found offensive.

Only once during Ocheltree's employment was Scollon Productions' management ever put on notice of conduct that could possibly constitute sexual harassment of Ocheltree. This was in June of 1994, shortly after Ocheltree was hired, when another employee told Bill Scollon that Ocheltree had complained about a male co-worker who told her an off-color joke. When Ellery Locklear asked Ocheltree about the incident, she confirmed it. Thereafter, as Locklear put it, the man was "terminated immediately." When Bill Scollon apologized to Ocheltree and told her that the employee had been terminated, she responded that she "didn't want him to be fired." Scollon, however, responded, "I am sorry; that is the way it is; we won't stand for it."

Ocheltree readily admits that after the initial incident, she never again complained to Scollon Productions' management about sexual harassment (although she said at trial that she tried to tell someone). When she testified before the Employment Security Commission during its hearing of her claim for unemployment compensation, Ocheltree mentioned she had been sexually harassed after the 1994 incident. This was Ocheltree's first allegation to Scollon Productions' management that she had been sexually harassed after the 1994 sexual harassment complaint.

Although Scollon Productions disputes her accounts, at trial, Ocheltree testified that she often overheard crude comments in the workplace. The following is a frank summary of all evidence presented by Ocheltree of such conduct or comments. At trial, Ocheltree testified that she overheard terms such as "mother fu----," "faggot," "dick head"

and "pussy" every day, and that, daily, her coworkers would talk about sexual activities they engaged in with their wives and girlfriends The males discussed having sex with women including depictions of women enjoying oral, anal and other robust sexual activity. The talk also included profanity and the telling of dirty jokes. The testimony makes clear that these comments were not about Ocheltree and no one was speaking to her.

Inappropriate conduct in the shop that Ocheltree alleged she saw included coworkers simulating sexual acts with a featureless cloth mannequin,[2] and the display of a body-piercing book.[3] Ocheltree alleges that the book contained a picture of a pierced penis and she claimed that her male co-workers laughed at her reaction to the book. Finally, Ocheltree alleged that a co-worker made up a line of music that he sang to her on one occasion. It included the words "come to me, oh baby come to me, your breath smells like c-- to me." (expletive deleted). Other than the "song," the body-piercing book, and the mannequin no conduct or comments were arguably directed at Ocheltree or women in general nor were they about Ocheltree. Because the conduct was not aimed at anyone in particular, or at any gender in particular, it could be offensive to any woman or man who did not enjoy such vulgar behavior. In fact, men who testified at trial said they also found the remarks offensive.

Ocheltree participated in at least some of this crude conduct. She admitted she "was not an angel" and cussed in the workplace. Several witnesses testified they heard

---

2 The en banc court stated the males did this "many times" in front of Ocheltree. Although a co-worker stated that he observed males do this in front of Ocheltree frequently, Ocheltree herself stated it only occurred twice and on at least one of these occasions, she walked in on the conduct.

3 Evidence that Plaintiff herself asked to see this magazine and was voluntarily looking at it while on a break was not refuted at trial.

Ocheltree talk about the size of her husband's penis and other "light" sexual matters. She also brought a picture of herself in a bikini and asked a co-worker if he thought it was sexy. She once brought her daughter into work and they played a game that involved them saying "sh**." (expletive deleted). She also brought a picture into work of a wall upon which her husband had written her name in urine.

In contrast to her trial testimony, in documents submitted with her charge of discrimination, Ocheltree described the harassment as "sexual conversation going on in the shop. Not all the guys would talk bad or ignorant in front of me. Just Jason Savage, Barry Brown. Harold Hirsch would say some nasty things from time to time but he alway[s] apoliged [sic] if he knew I could hear it."

Ocheltree testified that she was never solicited, frightened, touched, or ogled. She also admitted that she was never targeted for sexual comments (with the exception of the made-up song). Even the *en banc* court described the conduct as the men "needling each other." Ocheltree agreed the comments and conduct were not about her. The "song" and the mannequin incidents were the only conduct arguably directed toward her. However, it is unremarkable that some conduct involved her, because, if the atmosphere was as rife with poor taste as she described, it would be amazing if an occasional joke or crude behavior were not pointed at her. It is clear, however, that the vast majority of conduct occurred between the men.

The *en banc* court tried to paint a picture of the men laughing at Ocheltree's expense, however, her testimony did not at all indicate that they laughed at her reaction. Further, the testimony about the laughter only concerned one incident. In any event, the laughter in her presence was no different from the admitted provocation of some of the men toward the other men. The evidence shows, at worst, that the men

enjoyed watching the reactions of anyone who was offended by their behavior.

Scollon Productions provides a mechanism for complaining about harassment. While the policy was not crafted by an attorney to capture the legalisms of sexual harassment law, the employee handbook prohibits verbal abuse and provides that such abuse is grounds for discharge. It also states that the company has an "open door" policy: "Anyone having a complaint or problem should first try to resolve it with their immediate supervisor. Ellery or Bill are usually available throughout the day to help resolve complaints or problems not resolved by supervisors." More importantly, Ocheltree testified that she knew about and understood this policy and understood that Bill Scollon and Ellery Locklear would stop sexual harassment if they knew about it. She could hardly testify otherwise since she made a complaint of harassment in June of 1994 and Scollon took effective action to stop the conduct.

Ocheltree claims that she complained to Hirsch and that Hirsch was her supervisor. However, Harold Hirsch was not a member of Scollon Productions' management. He was an hourly worker who had no authority to hire, fire, promote or discipline employees; he was merely a lead person. He did not participate in the decision to fire Ocheltree nor did he evaluate her performance. Harold Hirsch had no authority to determine how many workers would be assigned to the shop, nor could he assign Ocheltree duties, nor schedule her to do particular work. She also claimed she told her co-workers to stop and even complained in a safety meeting. What she did not do was the one thing that would have stopped the alleged conduct. She never told Bill Scollon or Ellery Locklear.

Although Ocheltree concedes she never told management about her concerns, she contends that she tried to talk to Ellery Locklear several times. She claims that one

time Locklear was on the phone and she left him a note saying she needed to talk to him. Locklear testified he tried to find her but she was not in her work area. Locklear also testified that he saw Ocheltree frequently after this and she never approached him to tell him why she wanted to talk to him. Ocheltree never explained why she had time to pass notes or ask to speak to management and yet had no time to mention "sexual harassment."

REASONS FOR GRANTING THE PETITION

I. **THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS -- THAT SEXUAL CONDUCT IN THE WORKPLACE, IF SUFFICIENTLY SEXUAL IN NATURE AND IF PERVASIVE ENOUGH IS "BECAUSE OF SEX," I.E., THAT SUCH CONDUCT HAS A DISPARATE IMPACT ON WOMEN**

II. **THIS COURT SHOULD ADDRESS THE IMPORTANT QUESTION (FORESHADOWED IN THIS COURT'S DECISION IN *ONCALE V. SUNDOWNER OFFSHORE SERVICES*) OF WHEN CONDUCT WITH SEXUAL CONTENT IS "BECAUSE OF SEX" AND WHEN IT IS NOT.**

In this case, Ocheltree contends she was subjected to a hostile working environment in violation of Title VII. This contention is based, not on allegations of sexual desire or animosity toward women, but on sexually crude speech and conduct--a little of which was directed at Ocheltree but none of which could be said to be directed at her because of her gender.

The *en banc* court adopted the position that the sexually explicit conversations and jokes (a few of which were directed at Ocheltree) was "particularly offensive to women" and that it could be assumed, from the nature of the speech

and conduct, that it was done to make her uncomfortable "as the only woman in the workplace." *Ocheltree v. Scollon Productions Inc.*, 335 F.3d 325, 332 (4th Cir. 2003). In effect, the court found that sexually explicit conversations and conduct have a disparate impact upon women and, therefore, constitute sexual harassment.

To establish a claim of sexual harassment for an abusive work environment, either by co-workers or by a supervisor, Ocheltree must prove that: (1) the subject conduct was unwelcome; (2) it was based upon her sex; (3) it was sufficiently severe or pervasive to alter the conditions of Ocheltree's employment and to create an abusive work environment; and (4) it was imputable on some factual basis to the employer. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Spicer v. Com. of Va. Dept. of Corrections*, 66 F.3d 705 (4th Cir. 1995) (*en banc*).

This Court made clear that conduct is not "automatically discrimination because of sex merely because . . . [there is] sexual content." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998). In other words, Title VII is not a "general civility code." *Id.* The "occasional vulgar banter, tinged with sexual innuendo of coarse or boorish workers" is neither pervasive nor offensive enough to be actionable." *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995).

What is unclear is whether or not a court may, albeit "not automatic[aly]," find sexual harassment based on speech or conduct that is not clearly because of sex. As stated above, at most, Ocheltree heard crude remarks on a daily basis and, on a few occasions, witnessed conduct that was in poor taste. Except for a few disputed incidents, none of this was directed at Ocheltree. None of the remarks or conduct (including those directed at Ocheltree) were gender specific nor do they reflect gender-based animus. The conduct was

equally applicable and equally offensive to men and women. *See, Harris v. Forklift Systems, Inc.,* 510 U.S. 17 (1993) (harassment must be on the basis of sex). Contrary to the conclusions of the fourth circuit court, none of the conversations put women in a demeaning or negative light nor did they suggest abuse, control, or the use of force by males over females.

The Fourth Circuit Court has taken the position that gender-neutral conduct that is sexual in nature can have a disproportionate impact on women and therefore can be sexual harassment. The court based this on: (1) the song; (2) male co-workers showing Ocheltree a picture of a pierced penis and then laughing; (3) male co-workers pantomiming oral sex in front of Ocheltree and then laughing; and (4) male co-workers talking about sex with their wives and girlfriends.

To a greater or lesser extent, other federal courts have made similar rulings or have rejected this theory. *Turnbull v. Topeka State Hosp.,* 255 F.3d 1238 (10th Cir. 2001) ("conduct that affects both sexes may constitute sexual harassment if it disproportionately affects female staff"); *Henry v. Fed. Home Loan Bank of Topeka,* 155 F.3d 1257, 1261 (10th Cir. 1998) (overtly sexual conduct may be presumed to be because of gender); *Crist v. Focus Homes, Inc.* 122 F.3d 1107 (8th Cir. 1997) ("a finding that his conduct disproportionately affected female staff could support a determination that the harassment was based on sex"); *Stahl v. Sun Microsystems, Inc.,* 19 F.3d 533, 538 (10th Cir. 1994) (basing finding of harassment in part on allegedly derogatory language); *Andrews v. City of Philadelphia,* 895 F.2d 1469, 1482 (3d Cir. 1990) (basing finding of harassment in part on sexual innuendo, materials, and conduct in the workplace--intent should be recognized as a matter of course) *Jensen v. Eveleth Taconite Co.,* 824 F. Supp 847, 880 (D. Minn 1993) (holding females should not be subjected to sexually suggestive language); *Robinson v. Jacksonville Shipyards, Inc.,* 760 F. Supp

1486, 1522-23 (M.D. Fla. 1991) (recognizing some language has a disproportionate impact on women); *See, contra, Galloway v. Gen. Motors Serv. Parts Operations*, 78 F.3d 1164, 1168 (7th Cir. 1996) *overruled in part on other grounds by Nat'l R.R. Passenger Corp. v. Morgan*, 122 S. Ct. 2061, 2074 n.11 (2002); *Fox v. Sierra Dev. Co.*, 876 F. Supp. 1169, 1175 (D. Nev. 1995); *Vandeventer v. Wabash National Corp.*, 887 F. Supp. 1178 (N.D. Ind. 1995); *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 593 (5th Cir.1995); *Radtke v. Everett*, 442 Mich. 368, 501 N.W.2d 155, 167 (1993); See also, Robert Kearney, *The Disparate Impact Hostile Environment Claim: Sexual Harassment Scholarship at a Crossroads*, 20 Hofstra Lab. L.J. 185 (Spring 2003) (examining the issue of a disparate impact theory of sexual harassment); David S. Schwartz, *When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. Pa. L. Rev. 1697, 1784 (2002) (same); Cheryl L. Anderson, *Thinking Within the Box: How Proof Models Are Used to Limit the Scope of Sexual Harassment Law*, 19 Hofstra Lab. & Emp. L.J. 125, 170 (2001) (same); Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 Cornell L. Rev. 1169, 1223 (1998) (same); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale L.J. 1683, 1762 (1998) (same).

The fourth circuit court admitted that the vast majority of the rude conduct did not involve Ochletree and was not about her. Instead, it was about the mens' sexual exploits. However, the court failed to acknowledge the legal significance of this fact. Instead, the court argued the conduct had a disproportionate impact on women. This simply does not fit within any form of harassment clearly recognized by this court. *See, Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75, 80 (1998) (recognizing that illegal harassment could be: (1) desire-based conduct, (2) sexually derogatory terms reflecting hostility toward women, and (3) differing treatment between men and women). The conduct described by Ocheltree did not reflect an animus toward women. Clearly, no one stated or implied that women were unwanted in the

workplace. Also clearly, no one reflected a sexual interest in Ocheltree herself. Instead, the fourth circuit court has recognized a new form of harassment. In doing so, the court relied on sex-neutral, albeit crude and gross, behavior. The "song" could apply to either a male or a female. The sexual exploits discussed between the men describe women engaging in, and enjoying, what used to be considered deviant and even subservient behavior but which now are accepted contemporary sexual practices.

A disparate impact theory of sexual harassment is contrary to the rulings of this court and the plain language of Title VII. Harassment must be "because of" sex. Conduct that is admittedly neutral cannot be sexual harassment. Far from effectuating the purposes of Title VII, the fourth circuit court issued a paternalistic ruling that runs counter to Title VII's purpose of promoting the equal treatment of women in the workplace.

III. THIS COURT SHOULD ADDRESS THE IMPORTANT QUESTION OF WHETHER A COURT MAY COMBINE CONDUCT THAT CANNOT BE HARASSMENT WITH CONDUCT THAT MAY BE HARASSMENT TO DETERMINE IF THE STANDARD OF "SEVERE AND PERVASIVE" IS SATISFIED

The third requirement for a Title VII claim is proof that the discrimination is "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." *Meritor Sav. Bank,* 477 U.S. 57, 67 (1986). It was the Ocheltree's burden to demonstrate that the harassment was sufficiently severe or pervasive to create an objectively hostile or abusive work environment in violation of Title VII. In this case, none of the incidents about which Ocheltree or other witnesses testified suggest the kind of intimidating environment or constant and obscene behavior that constitutes an actionable sexually abusive environment.

All statements about which Ocheltree complains were delivered in a public setting where they were heard by anyone who was present--regardless of their gender. None of the statements were specifically directed at her. Ocheltree was never touched. She was never physically threatened or humiliated. Most of the allegedly offensive statements could be broadcast on primetime television.

To overcome this difficulty, the fourth circuit court combined the few instances that were arguably directed at Ocheltree with the background conduct that clearly could not be considered sexual harassment. The court thereby improperly converted conduct that does not violate Title VII to conduct that does. Although a court should consider the context and overall picture of the workplace in which the alleged harassment occurs, the fourth circuit has misconstrued this direction. *Oncale*, 523 U.S. at 81-82. In this case, the background conduct was clearly not aimed at Ocheltree or women at all. Although graphic and crude, it carried no inference of hostility toward women or Ocheltree. Far from providing a discriminatory explanation to the conduct aimed at Ocheltree, the background conduct makes clear that the behavior that directly involved Ocheltree was not based on sex. It was instead part of a larger pattern of inappropriate, but not illegal, sexual bantering and joking.

Once the background is isolated form the events that directly effected Ocheltree (or once it is cast in the proper light), the conduct described in this case falls far short of the standard of "hellish." *Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1013 (7th Cir.1997) (quoting *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir.1995)). She describes, at worst, occasional conduct that was unpleasant. This is clearly insufficient to constitute severe and pervasive conduct.

CONCLUSION

This Court should grant the petition for a writ of certiorari and reverse the decision of the Fourth Circuit Court of Appeals.

Respectfully submitted,

MALONE & THOMPSON,

Charles F. Thompson, Jr.
Counsel of Record for Petitioner
1527 Blanding Street
Columbia, South Carolina 29201
(803) 254-3300

Michael D. Malone
1527 Blanding Street
Columbia, South Carolina 29201